

McIntyre by itself refutes the assertions by the Examiner that those skilled in the art would want to know, by way of advertisements, how their product is doing in the marketplace.²⁶ Thus, claims 44 and 46-49 stand in condition for allowance. Appellants therefore request reversal of the 35 U.S.C. § 103(a) ground of rejection as applied to claims 44 and 46-49.

Application of Law to the Facts #3 – Claims 64-66 and 68-70

Claims 64-66 and 68-70 are separately distinguishable from the combination of Guyett with McIntyre. For example, claims 65 and 68 recite that the statistical report illustrates a number of first-time accesses of consumers to the interactive advertising message over a period of time, while claims 66 and 69 recite that the statistical report illustrates a comparison of consumers who were able to identify the commercial entity's logo, trademark, trade name, tag line, and/or product name verses a competitor's logo, trademark, trade name, tag line, and/or product name, and claims 66/70 recite that the statistical report of claims 33/67 illustrate information related to the consumer's interaction time with the interactive advertising message.

The Examiner asserts in the final Office action that neither Guyett nor McIntyre discloses data content in any statistical report. But the Examiner argues, citing In re Gulack and In re Lowry, that these data content limitations are

only found in the nonfunctional descriptive material and are not functionally involved in the method (or structurally programmed) steps recited. The steps would be performed the same regardless of data content. Thus, this descriptive material will not distinguish the claimed invention from the prior art in terms of Patentability....²⁷

Appellants respectfully disagree.

Each of the recited steps of claims 64-66 and 68-70 are functionally related to, and involved with, the statistical report itself and with the recited step, in claim 33/67, of "gathering data associated with the consumer's interactions with the present interactive advertising message." Thus, claims 64-66 and 68-70 are very much like the claims that

²⁶ September 6, 2006 Office action, pp. 8-9.

²⁷ September 6, 2006 Office action, pp. 8-9.